Robin Fretwell Wilson*: It is wonderful to be here again. I forgot how beautiful the Law School and Baltimore are.

First, let me thank the Federalist Society and the LGBT Law Student Alliance for co-sponsoring this discussion and to thank my friends and former colleagues, Professor Richard Boldt for moderating and Professor Jana Singer for taking up this important conversation. I will talk today about reconciling same-sex marriage with religious liberty, values that I will argue need not be in tension if legislatures enact nuanced, thoughtful legislation recognizing same-sex marriage.

Certainly, the outcome this spring of Maryland's proposed same-sex marriage legislation,[1] which passed the Maryland Senate only to die in the House, surprised many observers who saw its enactment as assured. I believe the bill's demise could have been avoided by balancing more robust religious liberty protections with the broadened definition of marriage.

Elsewhere across the country we have witnessed moral clashes over same-sex marriage and same-sex relationships, but it does not have to be this way.[2] Instead, specific legislative exemptions can provide individuals who cannot, for religious reasons, facilitate a same-sex marriage with a way to live together in peace with same-sex couples despite deep divisions over the nature of marriage.

As you know, Maryland's proposed law evolved over the course of its consideration by the Maryland legislature. Before the bill's amendment in the Senate, the bill offered only what I called "faux," or fake, protections. It limited its protections to clergy, who already receive protection in the U.S. and the Maryland Constitutions.[3] Clearly, such a protection gives nothing because those protections are already secured by the state and federal constitutions.

Every other state that had then authorized same-sex marriage by statute[4] provided more protection than Maryland's original Senate bill. New Hampshire, Connecticut, Vermont, and even the District of Columbia all recognized that merely exempting the clergy from having to preside over a same-sex marriage was not enough.[5]

So what was missing from Maryland's initial bill? As the country has stumbled forward with same-sex marriage, we have witnessed a number of moral clashes over it and other same-sex relationships. These have ranged from lawsuits over refusals to serve same-sex couples to canceled social services contracts to firings and resignations.[6] A couple of specific examples are useful because they identify what religious liberty protections may be needed and what those protections might address.

On the heels of Massachusetts' same-sex marriage decision (the first in the U.S.), *Goodridge*,[7] the state's justices of the peace were told by the then-Governor's chief counsel that they had to "follow the law whether you agree with it or not."[8] Anyone who turned away a same-sex couple, even if for religious reasons, even if someone else was immediately available to do the service for that couple, could be personally held liable for up to $50,000.[9] I don't know about you, but I cannot write a $50,000 check.

New Jersey provides a second example. There, a tax-exempt church-affiliated group associated with the Methodist Church was approached by two couples who wanted to hold their commitment ceremonies on the group's boardwalk pavilion. When the group refused, New Jersey revoked the group's tax exemption under a public lands program.[10] I do not have a particular problem with the state revoking the exemption because the state conditioned it on public access. For me, the word "public" means public; that is everybody. The difficulty came, however, when local taxing authorities, on the heels of the state's decision, yanked the group's exemption from property tax on the pavilion. Exemptions from *ad valorem* taxes can be big money exemptions. Go look at any church in downtown Baltimore. They are sitting on a ton of very valuable real estate, and their exemption from having pay tax on that real estate may be thousands or hundreds of thousands of dollars. In the New Jersey case, the local authorities ultimately billed the group for $20,000 in taxes on the specific piece of property, the pavilion alone, although I understand that the group paid less than that.[11] Now, it may be that New Jersey is unique in how it approaches exemptions from local taxes, but the specter of other state and local taxing authorities following suit after a religiously based refusal has spooked many religious organizations.

Outside those states that recognize same-sex marriage or same-sex civil unions, clashes have also occurred. Consider New Mexico. The New Mexico Human Rights Commission fined a small photography shop, Elane Photography, for refusing on religious grounds to photograph a same-sex commitment ceremony.[12] New Mexico neither recognizes same-sex marriage nor same-sex civil unions. The ceremony at issues was a commitment ceremony between the two women. Elane Photography was fined over $6,000 for refusing on religious grounds to photograph the ceremony, a decision that is still being appealed to the New Mexico Court of Appeals.

Without specific protections, religious organizations and individuals who step aside from celebrating same-sex marriages can be subject not only to private lawsuit under laws prohibiting discrimination on the basis of sexual orientation, but also suit under laws that prohibit discrimination on the basis of marital status—a ground on which these groups may have legitimately refused before the enactment of a broadened definition of marriage. Consequently, the source of possible tension between same-sex marriage and religious liberty comes not only from sexual orientation nondiscrimination bans but from marital status nondiscrimination bans too.

Organizations that step aside from facilitating same-sex marriage for religious reasons face stiff penalties from the government, not just private citizens. Maryland, for example, requires all public contractors from discriminating on the grounds of both marital status and sexual orientation in order to do contracts with the state,[13] raising the possibility of the denial of access to government contracts or grants because

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a group, for religious reasons, cannot recognize a same-sex marriage. This happened in San Francisco, which withdrew $3.5 million in social services contracts from the Salvation Army because the Salvation Army refused on religious grounds to provide benefits to its employees' same-sex partners.[14] $3.5 million is a big hammer.

For me, the clashes I have sketched differ in one important way: The justices of the peace actually involve access to the status of marriage so that, if the refusing Justice of the Peace says, "No, I'm not going to marry you," he or she could potentially act as a choke point on the path to marriage. This result would not be acceptable to me because the state has just said that these couples are entitled to the status of marriage. But with religious groups and vendors, we may have entities in the stream of commerce, but they cannot block access to the legal status of marriage. I believe this different impact should matter how we think about whether there is a duty to assist all who present or a right to refrain when another provider can assist the couple.

We have seen these kinds of deep divisions over social change before, and I believe that those prior experiences can help guide us here. I came to this issue as a family law and health care person. These clashes have followed a familiar pattern charted over the nearly forty years since *Roe v. Wade*[15] with abortion.

In 1973, when the Supreme Court's decision in *Roe* came down, it precipitated a significant demand for abortion. Almost immediately, the question arose: do health care providers have a duty to provide the abortion that a patient now seeks and to which, in fact, she has a constitutional right? Or can the provider simply say, "No, thank you, not me"?

Not surprisingly, family-planning advocates stepped in with litigation and strenuously pushed to broaden the right established in *Roe*, namely, the right of government to stay out of one's reproductive business. The suits sought to extend this negative right into an affirmative entitlement to another person's assistance. This occurred with both private lawsuits brought against individuals and against facilities. In the case of the facilities, the suits urged that the facility's receipt of public benefits or its free ride on taxes as a not-for-profit meant that when a facility refused to perform an abortion, it acted under color of state law in violation of 42 USC Section 1983.[16]

These suits were successful until Congress stepped in with the first health care conscience clause, the Church Amendment. That legislation prohibits a court from using the receipt of certain federal monies as a basis for making a private individual or an institution perform an abortion or sterilization that is contrary to "their religious beliefs or moral convictions."[17] Today, nearly every state in the nation—forty-seven states—have carved out a space for medical providers to continue in their professional roles without participating in acts that they consider immoral or which would violate their religious beliefs.[18]

These statutes give people who disagree on a profound moral issue the elbow room to live together in the same society in peace. Many of these statutes, at least at the state level, balance both the legitimate access concerns of women with the religious concerns of providers. Some, for example, say that the moral objections of physicians must ultimately yield to a patient's need for an emergency abortion.[19] But when it comes to an elective abortion, one that can happen any time, these statutes allow providers to step aside in that case.

These statutes provide a roadmap to finding live-and-let-live solutions to the moral clashes over same-sex marriage too. How would that work? First, I believe we can get in front of these collisions and tackle them proactively, like we do with objections to abortion. We can make potential objectors disclose their objections *ex ante* and make them public (in other words, objectors have to own the objections—no surprises), which would give state authorities and private employers time to react to the objection and perhaps staff around it. For example, a state's clerk's office could put in place procedures that allow an objector to object when other employees would gladly serve the couple—without same-sex couples even knowing that it happened.

Now, in rare instances, it is possible that permitting a religiously-based refusal may create a hardship for same-sex couples seeking a marriage license or, for that matter, even a reception hall or a photographer. When would that occur? It would occur if every clerk in the register's office or every reception hall or every photographer in town objects. That might occur, for example, in really remote areas.

So imagine that a same-sex couple resides in Nowhere, Montana, in the middle of nowhere. (You also have to imagine that Montana has same-sex marriage.) Now imagine that there is only one town clerk that can help the couple complete their application for a marriage license. By refusing to assist that couple, the clerk is acting as a choke point on the path to marriage, effectively barring them from the institution to which the state has just said they are entitled.

In this instance, because a real and palpable hardship would occur, I have argued that the religious liberty of the objector must yield.[20] Put another way, in a straight contest between marriage equality and religious liberty, religious liberty has to stand down. But outside this rare case of a hardship, where there are other clerks who would gladly serve the couple and no one otherwise loses by honoring the religious convictions of the objector, I believe this conviction should be honored.

With other commercial actors like the baker, the photographer, the reception hall owner, the wedding advisor, or others, I have a harder time saying that every vendor must serve every person who presents, just as I have a hard time saying that every doctor must be an abortion provider when Planned Parenthood had something like 850 clinics across the U.S. When access is assured in the marketplace, I have a hard time with forcing individuals to provide the service nonetheless.

In part, I am less willing to trample on religious beliefs here because I believe the hardships are likely to be fewer. Look at most phone books—they list dozens of photographers. Moreover, the service that is being denied, a photograph, is not nearly as important as denying a person's access to the legal status of marriage. The core right being given through same-sex marriage laws, as with *Roe*, is the right for the government to stay out of your relationships, but it is not necessarily the right to assistance from others to facilitate your relationship. The right of access to commercial services comes from anti-discrimination statutes, which were passed long before anyone ever imagined same-sex marriage. Because same-sex marriage laws add to this existing substrate of law, it is incumbent upon legislators

to think through how those laws fit together. In other words, the question in front of the legislature is not only whether to recognize same-sex marriage but whether the recognition of same-sex marriage also means that there will be a duty to facilitate those relationships by others in society.

As a practical matter—and this is less intuitive for many people—when push comes to shove, many providers will exit the market rather than provide for what is, to them, a religiously-objectionable service. This sometimes will be a loss for the community. I will give you one example. Catholic Charities of Boston, a religiously-affiliated adoption placement agency, had placed children for adoption in Boston for 103 years until a few years ago. Prior to the closure, Massachusetts prohibited sexual orientation discrimination in the placement of children for adoption. It appears that Catholic Charities placed children with gay individuals or couples, but when the bishop found out, the practice was stopped. Catholic Charities then started conversations with the Governor's office and legislature about whether they would support an exemption. When the answer that came back was "probably not," Catholic Charities shut their doors after 103 years.[21] Now, as a society we might be fine with that, but we have to realize that when we do not give exemptions, some groups will exit rather than violate their religious beliefs. The question for legislators is whether this is a loss that we can afford or are willing to absorb.

I have been working with a group of scholars that has urged the Maryland legislature and other legislatures to allow religious objections to same-sex marriage laws in certain instances.[22] For individuals in commerce and for government employees, our proposed text would allow individuals who cannot, for religious reasons, celebrate a same-sex marriage to step aside—but only if there is no substantial hardship to same-sex couples. If there is substantial hardship to same-sex couples in those cases, religious liberty in fact has to yield.

Even though I believe a hardship rule protects the interests of both sides, I also believe that the same-sex marriage advocates advantage themselves by putting exemptions on the table. Exemptions avoid a winner-take-all outcome. By doing that, they turn down the temperature on what has become an incredibly contentious issue. Exemptions take a powerful argument away from same-sex marriage opponents.

The experience of Maine's same-sex marriage legislation, which included a clergy-only exemption, provides a cautionary tale. Maine legislators stubbornly refused to include anything besides a clergy exemption in their law despite repeated urgings to do otherwise.[23] What happened? Maine voters repealed the Maine statute in a referendum by a narrow 53-47 percent margin.[24] This means if that 3.1 percent of the voters could have been swung on the question of religious exemptions—in other words, swung by the idea that exemptions can let people who are deeply divided on a social issue to live together in society in peace—Maine would still have same-sex marriage.

I want to come back to Maryland. What the Maryland Senate ultimately did with its initial bill was take the woefully inadequate clergy-only exemption, which is not an exemption at all, and added more robust exemptions. For example, they allowed religious organizations, including not-for-profits, to step away from providing "services, accommodations, advantages, facilities, goods, or privileges to an individual if the request is related to the solemnization of marriage" or the celebration of it, if doing so would violate the entity's religious beliefs.[25]

The amended Senate bill also exempted religious groups from "the promotion of marriage through religious counseling programs, education courses, summer camps, and retreats in violation of that entity's religious beliefs."[26] This provision would allow a religious organization to offer marriage retreats only for heterosexual marriages that jive with their religious beliefs. The Senate bill also allowed religiously-affiliated fraternal organizations (think the Knights of Columbus) to limit membership or insurance coverage to individuals if doing otherwise would violate the society's religious beliefs."[27] Crucially, the Senate bill specified that a refusal under these protective provisions could not create either a civil claim or cause of action nor constitute the basis for withholding government benefits or services from the entity. So that is where Maryland wound up, and yet it was not enough for the members of the House.

As I understand it, members of the House lacked the flexibility to amend this further. As I understand it, they were told that if they made further amendments, the Senate would not reconsider it, and so it died on the vine. But I believe if they had had the flexibility to make further exemptions, Maryland would in fact have a same-sex marriage law now.

Jana Singer*: I am delighted to have been asked to participate in this co-sponsored student event. As Professor Wilson suggested, this is exactly the sort of dialogue on important issues that the Law School ought to be promoting, and I am particularly delighted to share the table with my former colleague Robin Wilson. We miss Robin here, and it is nice to have her back at Maryland, if only briefly.

Let me start by identifying points on which Professor Wilson and I agree. I think we agree that the interests of both same-sex couples who wish to marry and religious individuals are worthy of respect. I think we also agree that states should seek solutions that attempt to accommodate both sets of interests where such accommodation is possible and consistent with other important societal and constitutionally-protected interests, such as equality and the separation of church and state.

Where we disagree, I think, is whether the broad-based exemption scheme that Professor Wilson has proposed—both here in Maryland and in her excellent book that I also commend to you[1]—meets these criteria. I believe it does not. In particular, I believe that her proposal raises serious constitutional concerns under both the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. I also believe that it represents undesirable public policy and that it sets a dangerous precedent for other potentially even broader claims for religious-based exemptions from generally-applicable laws, particularly civil rights laws. Finally, I believe that the abortion/health care conscience example that Professor

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Wilson invokes in support of her proposal does not provide an apt or a persuasive analogy.

Let me start with my constitutional concerns. I think it is fair to say that the Court's current Religion Clause jurisprudence is confused, to put it politely. Nonetheless, I think that several important principles emerge. First, as Professor Wilson has acknowledged in her writing, the Constitution does not require that the legislature provide religiously-based exemptions from generally-applicable laws even where the operation of those laws imposes burdens on religion or on religious individuals. That is the teaching of *Employment Division v. Smith*.[2] Laws that recognize same-sex marriage are generally applicable and not targeted at religion. That means that the legislators are not constitutionally compelled to create the sort of exemption scheme that Professor Wilson advocates. And I think we both agree on that.

Second, where the legislature does provide accommodations, it must do so in a way that survives Establishment Clause scrutiny. Here, the jurisprudence gets even murkier, but I think that there are a number of important criteria that emerge and that various members of the Court agree on:

1. In order to survive Establishment Clause scrutiny, an accommodation must have a secular as opposed to a religious purpose. While removing a special burden that the government imposes on religion may count as an acceptable secular purpose, simply favoring religion over non-religion does not.

2. Government action cannot have the primary effect of advancing or inhibiting religion.

3. It should not promote excessive government entanglement with religion.

4. Recent cases, in particular, have expressed concern about government actions that somehow communicate or suggest an endorsement of religion (the "endorsement" test).

I think that the exemption scheme that Professor Wilson proposes creates problems on all of these criteria. The purpose of the exemption scheme, I think, is explicitly religious. It is available only for religiously-motivated actions and objections, not for other moral objections or for individuals who have strong moral but not religiously-based objections to same-sex marriage.

Similarly, because it is available only for religiously-based objections and the actions of religious institutions, I think it has a primary effect of advancing religion, and this privileging of religious faith objections over non-religious ones, even strong moral objections, arguably violates the neutrality principle that has been central to recent Establishment Clause cases, particularly cases that have rejected challenges to government programs that benefit both religious and non-religious institutions. The Court has upheld those, emphasizing that the government aid is neutral with respect to religion and that it does not designate beneficiaries based on religious criteria, which is exactly what the exemption scheme that Professor Wilson is advocating does.

Third, I think that a broad-based exemption scheme, applicable to individuals, risks excessive government entanglement. In the proposal that Professor Wilson presented to the Maryland legislature, the criteria for an exemption for individuals and small business owners is that facilitating or assisting in a same-sex marriage must violate their "sincerely-held religious beliefs." In her writing, Professor Wilson has distinguished such a "sincerely-held" belief from any anti-gay animus or a bare desire not to support same-sex marriage. I question whether the government, a court, or an administrative agency can differentiate between those two types of objections without getting entangled in religious doctrine. Avoiding such entanglement is a core Establishment Clause concern.

Finally, I think that a number of the exemptions that Professor Wilson advocates risk communicating government endorsement of religion. This is especially problematic with respect to actions by government employees, such as the town clerks or justices of the peace, who would be covered by the proposed exemption scheme. In performing—or refusing to perform—their public functions, these officials literally speak for the government. So I fear that if the Maryland legislature were to adopt the broad exemption scheme that Professor Wilson has endorsed, this would, at the very least, create significant Establishment Clause problems and that, too, is a religious value. So, in many respects, a scheme that would purport to help religious individuals might end up hurting the religious pluralism and the separation between church and state that lies at the core of the First Amendment.

I also think that an exemption scheme like the one Professor Wilson advocates raises serious equal protection concerns, in that it would treat some state-recognized marriages differently from others. Such disparate treatment is likely to be subject to equal protection heightened scrutiny because the Court has recognized marriage as a fundamental right. Even though some courts have suggested that the state may adopt a traditional definition of marriage that excludes same-sex couples, once the state decides to define marriage to include same-sex as well as opposite-sex couples, I think it may be in real trouble if it then tries to differentiate between same-sex and opposite-sex marriages. At the very least, the state would have to show that the distinction is closely related to an important state interest other than benefiting religion. Imposing special burdens on same-sex marriages also distinguishes among marriages based on the gender of their participants, and that raises the possibility that the exemption scheme violates antidiscrimination norms embodied in the Court's gender equality jurisprudence.

It is not just the constitutional concerns that make me wary of a broad exemption scheme. I think the scheme represents bad public policy for a number of reasons. First, I think that it creates significant administrative and enforcement burdens. Not only do the courts have to decide what constitutes a sincerely-held religious belief as opposed to anti-gay animus, but some religions, including my own, Judaism, are conflicted about same-sex marriage, with some branches and congregations endorsing same-sex marriage and others objecting vehemently on religious grounds. Suppose that somebody who identifies as a reform Jew—whose official denomination supports same-sex marriage—claims that she has a personal religious belief against it—how does the government determine whether that qualifies as a "sincerely-held religious belief"? In addition, the exemption

is defined to allow individuals to refuse to engage in actions "that assist or promote . . . the celebration of any marriage" or that "directly facilitate the perpetuation of any marriage." Would that include providing flowers for a pre-wedding rehearsal dinner? What about food for a post-wedding brunch? Would lodging for out-of-town wedding guests qualify? Or how about a small business that sells bridal gowns or rents tuxedoes? Could they refuse to provide services for a same-sex celebration? Would the facilitation language extend to providing accommodations for a honeymoon? What about a five-year anniversary party?

I have to concede that I have some particular knowledge here, because I recently got married, so I know very well just how many services and business may be connected to a marriage. But I do not want to task courts or agencies with the job of determining which services qualify for the exemption and which do not, nor do I think it is fair that vendors may not know in advance whether they are entitled to an exemption or whether they are not.

That raises an additional objection, which is that vendors' efforts to access the exemptions may raise significant privacy concerns. That is, how are all these vendors to know whether the marriage for which they are being asked to provide services involves an opposite-sex or a same-sex couple? As I am sure students know better than I do, negotiations for goods and services today are often done over the Internet, or the telephone. You do not have to be high-tech. And a couple or an individual may not meet face-to-face with a vendor until a contract has been signed. Similarly, where prospective spouses live in separate cities, or live in the same city but have busy work lives, only one member of the prospective couple may be communicating with a vendor prior to the wedding. Will such vendors have to ask the gender or sexual orientation of the customer's intended partner? Do we want to encourage vendors to ask such questions? Similarly, when a person books a double room at a small bed and breakfast, will the establishment ask whether the couple who will be using the room consists of two people of the same gender, and if so, whether they are on their honeymoon or simply taking a vacation?

Some of these examples may seem silly, but I think they illustrate the difficulties of administering the scheme that Professor Wilson endorses, and since one of the arguments that she and her colleagues make in favor of a broad exemption scheme is that it will reduce litigation, it is certainly appropriate to consider whether administering the proposed scheme may, in fact, increase litigation.

Third, I think that Professor Wilson underestimates—and perhaps mischaracterizes—the kinds of burdens that these exemptions are likely to impose. Take, for example, the county office that issues marriage licenses and employs two clerks; a small office, but not single-clerk. One has a sincerely-held religious objection to same-sex marriage, but the other does not. So they decide to put up signs to tell potential registrants where they need to stand. Two lines—one says "Heterosexual Couples Only." The other says, "Homosexual Couples May Apply Here."

Having to stand in one line rather than the other probably does not constitute "substantial hardship" under Professor Wilson's proposal nor, since there are two clerks, does this become a choke point that would override an exemption. Yet the harm that is created by this separate-but-equal setup is not just the small inconvenience to the individuals and couples who seek to marry. It is also the undermining of the norms of equality and inclusion that underlie the extension of marriage to same-sex couples. A focus on individual inconvenience and chokepoints ignores these important harms.

Finally, although the accommodations that Professor Wilson proposes are specific to same-sex marriage, I think their logic extends much further, to other religious-based objections to general laws. Many religious individuals sincerely object not only to same-sex marriage but also to same-sex relationships more generally, or even to all homosexual conduct. Indeed, these individuals often cite scripture in support of their broader, religious-based objections.

Under Professor Wilson's logic, should these individuals be permitted to refuse to serve all lesbian and gay couples—or even all lesbian and gay individuals—on the grounds that providing such service facilitates or assists the conduct that they find religiously objectionable? Or perhaps the religiously-based objection is to same-sex couples raising children. Should a teacher be permitted to refuse to teach a child of a same-sex couple, on the grounds that teaching that child constitutes an endorsement of the parenting relationship, or, if simply teaching the child would not qualify, what about refusing to hold a parent-teacher conference with the child's same-sex parents? I think Professor Wilson's discussion of adoption and Catholic Charities shows that these are not hypothetical concerns.

Of course, religious objections are not necessarily limited to same-sex intimacy. Many religious individuals disapprove of non-marital sex more generally. Should such objectors be exempted from serving unmarried couples or unmarried individuals who engage in non-marital sex on the ground that doing so promotes or facilitates the religiously objectionable behavior?

And what about interracial marriage? Not all that long ago, many religions objected to interracial marriage. Indeed, as many of you know from your constitutional law classes, the trial judge in *Loving v. Virginia* offered an explicitly religious rationale for his decision to uphold Virginia's anti-miscegenation statute. Similarly, in the congressional debate over the 1964 Civil Rights Act, several senators who opposed the legislation read Bible passages into the *Congressional Record* to explain their opposition. Nor has such opposition to interracial marriage entirely disappeared. Just over a year ago, a Louisiana justice of the peace refused to marry an interracial couple in part because he believed that their children would end up suffering. That justice of the peace eventually resigned after a public inquiry, but I fear that the logic behind Professor Wilson's proposal might well have protected his conduct.

Although Professor Wilson does not mention the analogy to interracial marriage, other advocates of broad religious-based exemptions do. For example, Professor Doug Laycock has written in support of Professor Wilson's proposal that, "In more traditional communities, same-sex couples planning a wedding might be forced to pick their merchants carefully, like black

families driving across the South half a century ago."[3] Professor Laycock seems relatively unconcerned about the analogy, but I think many of us might feel differently.

Finally, let me just say two words about why I think that the abortion and other health care conscience clauses that Professor Wilson cites in support of her exemption proposal are not a good analogy. First, virtually all of the federal and state conscience clauses apply to health care providers and professionals who object to covered procedures on non-religious, as well as religious grounds. For example, the Federal Church Amendment protects individuals or institutions who refuse to perform an abortion or sterilization contrary to their "religious beliefs or moral convictions." Most state conscience clause statutes contain similar language. These statutes therefore avoid the very troubling Establishment Clause concerns that I noted earlier.

Second, these health-related conscience clauses are generally limited to shielding providers from having to participate directly in a procedure they find religiously or morally objectionable. They do not extend protection to conduct that merely facilitates the disfavored procedure or treats the disfavored procedure as valid, as I think Professor Wilson's proposal would. Conscience clauses that were as broad as Professor Wilson's proposed exemptions would allow, for example, a manufacturer of surgical equipment to stipulate that its instruments not be used to perform abortions or a florist to refuse to deliver flowers to hospital patients who had undergone sterilization. In that context, I think many of us would be more troubled by health care conscience clauses.

Third, the competing patient rights at issue in the health care context are primarily negative rights—e.g., the right to be free of "undue" government interference with respect to reproductive and contraceptive decision-making. As Professor Wilson has pointed out, these are not positive rights to government endorsement or assistance. Civil marriage, by contrast, is a positive right—a status created and privileged by the state. One of its primary purposes is to confer state recognition and endorsement on a relationship—indeed, that is largely why the issue of same sex marriage is so fraught on both sides. This difference suggests that religious-based exemptions to same sex marriage recognition—particularly exemptions that apply not only to religious institutions, but also to individuals and businesses—cut deeply into the underlying right, and the equality norms that support it, in a way that conscience clause protections do not, regardless of whether the exemptions create tangible hardship for individual same sex couples. Thus, the emphasis of many exemption proponents on "insubstantial burdens" misses an important point. This damage done by broad-based exemptions to same-sex marriage goes well beyond the tangible burdens that such exemptions impose on individuals and same-sex couples. They also exact a heavy price on the norms of equality and inclusion that same-sex marriage recognition entails.

Professor Wilson Response: Thank you, Jana for the thoughtful reactions. I want to clarify only a couple points.

First, our proposed exemption is limited to religious objections for a reason. I think personally that if we allow exemptions to the celebration of same-sex marriage for moral reasons, that would encompass people having moral objections to homosexuality, which is not something I can support.

The marriage conscience protection we propose extends to objections to celebrating same-sex marriage itself, not to objections to homosexuality. Now, to avoid the constitutional problems in the past, the U.S. Supreme Court has read a statute to include moral objections, too, precisely to avoid the Establishment Clause problem. It has done this, for example, in the military objector context. So when federal law allowed conscientious objectors to step aside from fighting only for reasons of one's religious training and belief, the Supreme Court broadened the interpretation of that protection to include non-religious, moral objections.[28]

In my view, a legislative exemption that deliberately encompasses moral objections would encompass objectors whose real problem with same-sex marriage is with homosexuality. This treads too closely to anti-gay animus. But as I have often said, I do not believe that all objections to facilitating a same-sex marriage stem from anti-gay animus. Quite the contrary. For many people, marriage itself is a religious sacrament and the assistance of it may well be a religious act in their minds. It is true that not all of us would agree with that, but that is what these individuals believe. By limiting the marriage conscience protection only to objections to same-sex marriage on religious grounds, and not to all moral objections, we reduce the chance that people opposed simply to homosexuality will claim the protection.

I think that some of the concerns Professor Singer raises are really profound. But the law already does a lot of what Professor Singer thinks we ought not be doing, and let me give you specific examples. Maryland's non-discrimination on sexual orientation statute has what is called a Mrs. Murphy exemption. It simply exempts from the scope of the statute,

> [w]ith respect to discrimination on the basis of sex, sexual orientation or marital status, the renting of rooms in any dwelling, if the owner maintains a dwelling as the owner's principal residence, or the rental of any apartment in the dwelling that contains not more than five rental units, if the owner maintains a dwelling . . . ."[29]

The choice not to rent in this case just does not count as illegal discrimination.

Who are these people who have a room to rent and receive protection here? I suspect they are religious ladies who do not want people having sex outside of marriage (any sex) in the room next door. If I am right, this is, in fact, a religious exemption, and it is already in Maryland law.

Maryland offers a second, clearer example. Maryland's employment discrimination ban, prohibiting discrimination on the basis of race and other grounds, including sexual orientation and marital status, exempts a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion or sexual orientation, to perform work connected with their activities or of the religious entity,[30] much as Title VII and other non-discrimination statutes do.

Statutes that are designed to protect people from discrimination include these carve-outs because there are two interests at play: the nondiscrimination norm we are trying to establish in that statute and the interests of other people in society who are asked to navigate that new norm.

Jana brings up an equally compelling point about dignitary losses, and I do not want to minimize them. In later pieces, I have suggested that we can avoid separate-but-equal treatment, or more concretely the problem of two lines for applying for marriage licenses as a way to handle objections. For example, we can use a Division of Motor Vehicles-style intake system in which customers approach a single window or clerk, who gives the customer a number and sends them to the correct window.

In a recent piece, "Insubstantial Burdens," which explores the idea of government clerk objections,[31] I talked to Massachusetts clerk's offices and asked them how many clerks work in a given office and how many same-sex applications it receives, to gauge how many religious objectors we are likely to have, and how often this is going to come up. In other words, would it be easy and fairly costless to exempt somebody? In those cases, the answer seemed to be yes.

A DMV system makes it not only easy to staff around an objector, it also makes it invisible to the public. So say you have an office with four clerks—Faith, Hope, Charity, and Efficiency—and only Faith has a problem with same-sex marriage. Adam and Steve walk up. Obviously we do not want to assign Faith to the central intake desk because she has a religious objection. But we can stick her on other tasks, and let Efficiency or another clerk perform the intake role of assigning the public to the right window—in this case, Efficiency will direct Adam and Steve to a window staffed by someone other than Faith. Even with Faith stepping aside, Adam and Steve receive their necessary license from Hope or Charity or Efficiency, and they never even need to know that Faith had a religious objection.

My research with the Massachusetts clerks offices revealed another interesting point: Faith is not out back eating bonbons or getting an extra smoking break because she objects. Instead, she moves onto the next piece of work. This is so because the clerk's offices are working at almost top capacity, no surprise in this economy and with shrinking government budgets.

Allowing Faith to step aside is also consonant with what we do under Title VII. Title VII gives religious employees the right in some instances to receive accommodation of their religious beliefs, just as it provides protections against discrimination on other grounds. Now, Jana is worried that the message sent by society with exemptions somehow undercuts the norms established in those statutes. But I suspect that if Congress had not provided protections for religious organizations and religious employees in Title VII, we likely would not have Title VII.

The real question on the table is this: are same-sex marriage advocates willing to accept ninety-five percent of a loaf? If advocates want to establish the marriage equality norm, I believe they, and we, need to find a way in a plural, liberal, democratic society for both religious objectors and same-sex couples to live together.

One last point about the abortion statutes. They are often broad and provide protection to anybody who somehow touches the abortion process and has a moral or religious objection. For example, the Pennsylvania statute says, and I am paraphrasing, that except for facilities like Planned Parenthood that are exclusively devoted to the performance of abortion, no medical personnel or employee or agent or even a student shall be required against their conscience to aid, abet, or facilitate the performance of an abortion.[32] This is incredibly broad.

Now, Professor Singer worries that exemptions will violate the Establishment Clause. In a recent piece in a Northwestern journal,[33] I list a number of U.S. Supreme Court cases that have touched on this question. They give some indication that exemptions are not per se a violation.

In a case called *Caldor* (1985),[34] a Connecticut statute allowed Sabbath observers to take off on whatever is that observer's Sabbath day, a completely unqualified right to step aside if your Sabbath practice says you cannot, for example, work on Friday. In concluding that the statute did violate the Establishment Clause, Justice O'Connor in her concurrence contrasted this statute with Title VII, which has a qualified exemption (not unlike the qualified exemption we propose in the marriage conscience protection, although the two are not identical). She said in particular that Title VII calls for, in her view, reasonable rather than absolute accommodation, and it extends protection to all religious beliefs and practices rather than protecting only the Sabbath observance.

Subsequent cases like *Amos* involved a direct challenge to Title VII as violating the Establishment Clause.[35] There the Court emphasized that an exemption need not come packaged with secular benefits. In other words, you can give a religious exemption without the moral exemption, and that does not by itself make the whole thing fall, which was the model that my group of scholars was working off of.

More recently in *Cutter* (2005),[36] the Court upheld the Religious Land Use and Institutionalized Persons Act's[37] accommodation of religious practices for people who are institutionalized or put in prison. They said in particular that RLUIPA conferred no privileged status on any particular sect, and it did not single out any bona fide faith for disadvantageous treatment.

I think these cases give us a lot of food for thought in what is, as Jana noted, a confused area of the law. At the least, they show that not all accommodations slip over into the unconstitutional establishment of religion. As a matter of public policy, I do not want to authorize people to do something that masks anti-gay animus. By narrowly focusing only on the marriage relationship, my goal was to respect religious beliefs as to the nature of marriage, without, in fact, authorizing objections to homosexuality.

Endnotes

1 Senate Bill 565, *available at* http://mlis.state.md.us/2009rs/bills/sb/sb0565f.pdf.

2 *See generally* Same-Sex Marriage And Religious Liberty: Emerging Conflicts (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell

Wilson eds., 2008).

3 *See* Senate Bill 565 § 2, *available at* http://mlis.state.md.us/2009rs/bills/sb/sb0565f.pdf; *see also*, *e.g.*, M.D. Const., Declaration of Rights, art. 36.

4 At the time of this speech, New York had not yet enacted same-sex marriage legislation.

5 *See* N.H. Rev. Stat. § 457:37 (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to" the "solemnization," "celebration," or "promotion" of a marriage); Conn. Pub. Act No. 09-13 (2009) §§ 17-19, *available at* http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to" the "solemnization" or "celebration" of a marriage, and providing separate exemptions for religious adoption agencies and fraternal benefit societies); 9 Vt. Stat. Ann. § 4502(l) (2009) (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to" the "solemnization" or "celebration" of a marriage); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. Law No. L18-0110 (enacted Dec. 18, 2009, effective Mar. 3, 2010), *available at* http://www.dccouncil.washington.dc.us/ lims/legisation.aspx?LegNo=B18-0482 (exempting religious societies and religiously affiliated non-profits from providing "accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a same-sex marriage, or the promotion of same-sex marriage through religious programs, counseling, courses, or retreats . . .").

New York also enacted legislation with more robust exemptions. *See also* N.Y. Dom. Rel. Law § 10-b (2011) (exempting religious institutions, benevolent orders, and religiously affiliated not-for-profit corporations or any employee thereof from any requirement to provide "services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage").

6 Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws,* 5 Nw. J. L. & Soc. Pol'y 318 (2010).

7 Goodridge v. Dept. of Public Health, 798 N.W.2d 941 (Mass. 2003).

8 *See* Katie Zezima, *Obey Same-Sex Marriage Law, Officials Told*, N.Y. Times, Apr. 26, 2004, at A15.

9 *See also* General Law of Massachusetts, Chapter 151B, Section 5 (providing for civil penalties up to $50,000 when a party commits two or more discriminatory practices during a seven-year period preceding a complaint, and for smaller penalties in other instances).

10 Bernstein v. Ocean Grove Camp Meeting Ass'n, No. PN34XB-03008 (N.J. Dep't of Law and Public Safety, Notice of Probable Cause issued Dec. 29, 2008).

11 Jill P. Capuzzo, *Group Loses Tax Break over Gay Union Issue*, N.Y. Times, Sept. 18, 2007 (describing the case of *Bernstein v. Ocean Grove Camp Meeting Ass'n*, in which New Jersey revoked the property tax exemption of a beach-side pavilion controlled by an historic Methodist organization, because it refused on religious grounds to host a same-sex civil union ceremony).

12 Elane Photography v. Willock, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct.) (filed July 1, 2008).

13 *See, e.g.*, Md. Code Regs. 21.05.08.07 (2010) (prohibiting public works contractors from discriminating on the basis of, among other things, "marital status, [or] sexual orientation").

14 *See* Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, S.F. CHRON., July 10, 1998, at A-1 (describing how the Salvation Army lost $3.5 million in social service contracts with the City of San Francisco because it refused, on religious grounds, to provide benefits to the same-sex partners of its employees).

15 410 U.S. 113 (1973).

16 *See, e.g.*, Taylor v. St. Vincent's Hospital, 523 F.2d 75 (9th Cir. 1975).

17 42 U.S.C. § 300a-7(c) (2011).

18 Same-Sex Marriage And Religious Liberty, *supra* note 3, at 299 (listing state statutes modeled after the Church Amendment).

19 *See, e.g.*, Iowa Code § 146.1 (2005) ("An individual who may lawfully perform, assist, or participate in medical procedures which will result in an abortion shall not be required against that individual's religious beliefs or moral convictions to perform, assist, or participate in such procedures. . . . Abortion does not include medical care which has as its primary purpose the treatment of a serious physical condition requiring emergency medical treatment necessary to save the life of a mother.").

20 *See* Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws,* 5 Nw J. L. & Soc. Pol'y 318 (2010).

21 *See* Patricia Wen, *"They Cared for the Children": Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, Boston Globe, June 25, 2006, at A1 (explaining how Massachusetts threatened to revoke the adoption license of Catholic Charities for refusing on religious grounds to place foster children with same-sex couples).

22 Letter to Senator Brian E. Frosh, Chairman of the Senate Judicial Proceedings Committee (Jan. 26, 2011), *available at* http://mirrorofjustice.blogs.com/files/maryland-letter.pdf; Letter to Senator Dean G. Skelos, New York State Senate (May 17, 2011), *available at* http://www.nysun.com/files/lawprofessorsletter.pdf.

23 An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, *available at* http://www.mainelegislature.org/legis/bills/display_ps.asp?ld=1020&PID=1456&snum=124.

24 *See* November 3, 2009 General Election Tabulations, *available at* http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html.

25 Senate Bill 565, *available at* http://mlis.state.md.us/2009rs/bills/sb/sb0565f.pdf.

26 *Id.*

27 *Id.*

28 Same-Sex Marriage and Religious Liberty: Emerging Conflicts (Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson, eds., 2008).

29 494 U.S. 872 (1990).

30 Douglas Laycock, *Afterword* in Same-Sex Marriage and Religious Liberty: Emerging Conflicts, *supra* note 1, at 200.

31 *See* Welsh v. United States, 398 U.S. 333, 344 (1970) (plurality decision) (interpreting the breadth of the conscientious objector status statute as extending to "deeply held moral" and "ethical" beliefs).

32 Md. Code Ann., State Gov't § 20-707 (2010).

33 Md. Ann. Code 49B, § 18(2) (2010) (exempting any "religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion or sexual orientation to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities" from the prohibition on discrimination in employment.)

34 Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws,* 5 Nw. J. L. & Soc. Pol'y 318 (2010).

35 18 Pa. Cons. Stat. Ann. § 3213(d) (West 2000).

36 Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws,* 5 Nw. J. L. & Soc. Pol'y 318 (2010).

37 Estate of Thornton v. Caldor, Inc., 472 US 703 (1985).

38 Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987).

39 Cutter v. Wilkinson, 544 U.S. 709 (2005).

40 42 U.S.C. §2000cc-1, *et. seq.* (2011).